in my opinion, the written agreement envisaged under the Act is not of a nature similar to the agreement as in Exh. TH1 where only the intended or proposed arbitrator and one of the parties to the dispute are parties to the agreement. To my mind, the written agreement envisaged is of a nature where all the parties to the arbitration proceeding are parties to the agreement. Since the agreement in Exh. TH1 is not one that is envisaged by the Arbitration Act, therefore, with respect, Encik Hardial Singh cannot be said to have been duly appointed as an arbitrator under the Arbitration Act.

Even assuming that Encik Hardial Singh is a duly appointed arbitrator under the Arbitration Act, yet he does not satisfy requirement (b). As a matter of fact, Encik Hardial has come to Court to appear before me as an advocate for one of the parties to the dispute, that is, he has come to Court to appear and to argue a case on behalf and in the interest of only of the respondent. He is not here to act as an impartial arbitrator. He is here as an adversary to the applicant who is also one of the parties to the dispute. Therefore, with due respect, he cannot be said to have come to Court to settle or attempt to settle a dispute between parties to the arbitration.

In conclusion, Encik Hardial does not qualify under s. 38(f) of the Legal Profession Act. As such, he cannot act as an advocate and solicitor for the respondent.

I therefore confirm the decision made in chambers on 6 October 1993, with costs to the applicant.

KANG KOK HIANG & 2 ORS.

v.

ONG KAH HOE

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 22-7-1989]
18 OCTOBER 1993

LAND LAW: Defendant registered proprietor of undivided half share of land - Plaintiffs seeking declaration that defendant only entitled to an undivided $^{5}/_{11}$ share of the land - Whether defendant's title to the land defeasible.

PRACTICE & PROCEDURE: Limitation - Accrual of plaintiffs right of action - Whether limitation period exceeded - Application of s. 9(1) of the Limitation Act 1953.

The plaintiffs sought a declaration that they are entitled to an undivided $^{6}/_{11}$ share of a piece of land (the Land) together with the six shophouses erected thereon and that the defendant is entitled to an undivided $^{5}/_{11}$ share of the Land together with the five shophouses erected thereon.

The plaintiffs contended that the defendant was a trustee or volunteer in respect of the extra shophouse, he having been informed by his predecessor in title and thereby having had notice of his entitlement being limited to $^{5}/_{11}$ undivided share as per the terms of the agreement dated 17 July 1966 entered into between the plaintiffs and the defendant's predecessors in title. The plaintiffs argued that the defendant had committed fraud by refusing to give effect to the terms of the agreement and by refusing to subdivide or partition the Land in accordance to the terms of the agreement.

The defendant claimed that he had no knowledge of the agreement when he purchased the undivided half share of the Land which he did so in good faith and for valuable consideration. The defendant conterclaimed for a declaration that he on the one hand and the plaintiffs jointly on the other hand were the co-owners each owning a half undivided share in the Land.

Held:

[1] The defendant being the registered proprietor of an undivided half share of the Land his title thereto, pursuant to the provisions of s. 340(1) of the National Land Code 1965, is

indefeasible. The plaintiffs have not shown that the defendant was guilty of dishonesty in relation to the transaction resulting in registration and as such have failed to establish that the defendant's title is defeasible.

[2] As far back as 21 October 1969the plaintiffs knew that the defendant was the registered proprietor of an undivided half share of the Land and must be taken to have accepted that as a fact for they did nothing to indicate otherwise, until much later when they tried to alter the situation.

[3] The plaintiffs, by making payment by way of reimbursement in respect of quit rent for the Land as claimed by the defendant in the Magistrates Court, wherein the defendant pleaded that he was the owner of an undivided half share in the Land, and furthermore having paid 50% of the quit rent for 1988, must be taken to have admitted and acknowledged that the defendant is without dispute the owner of and entitled to half undivided share of the Land.

[4] Any rights of the plaintiffs have merged into the conveyance. Once the purchaser is registered as proprietor the rights under the agreement are extinguished unless the agreement expressly or impliedly provides for those rights to continue. There was no such provision in the present agreement.

[5] The right of action of the plaintiffs would have commenced on the date of the agreement and any action the plaintiffs saw fit to bring in respect of that right had to be brought within 12 years of the date of the agreement under s. 9(1) of the Limitation Act 1953. That period had long expired when this action commenced and the plaintiffs claim being clearly statute-barred the Court has the power to strike out the claim.

[6] In any event the plaintiffs by reference to the agreement were not heirs, executors, administrators or assigns of the parties thereto and therefore enjoyed no rights thereunder.

[Plaintiffs claim dismissed with costs to be taxed. Defendant's counterclaim allowed in part].

Cases referred to:

Assets Company, Ltd. v. Mere Roihi & Ors. [1983] 1 CLJ 183 / [1905] AC 176 ***(refd)***

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ 81 ***(refd)***

Tio Chee Hing & Ors. v. Government of Sabah [1987] 2 CLJ 531 / [1981] 1 MLJ 207 ***(refd)***

Chung Khiaw Bank Ltd. v. Tio Chee Hing [1987] 2 MLJ 701 ***(refd)***

Knight Sugar Company Ltd. v. The Alberta Railway & Irrigation Company [1938] 1 All ER 266 ***(refd)***

Pallos v. Munro [1970] 92 WN 797 ***(refd)***

Montgomery and Rennie v. Continental Bags (NZ) Ltd. & Anor. [1972] NZLR 884 ***(refd)***

Svanosio v. McNamara [1956] 96 CLR 186 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 9(1)

National Land Code 1965, s. 340(1)(2)

For the plaintiffs - K.S. Dass (Chandra Mohan with him); M/s. K.S. Dass & Partners

For the defendant - Vinayak P. Pradhan (L.T. Chia with him); M/s. Skrine & Co.

JUDGMENT

Richard Talalla J:

On 17 July 1966 Mok Ghee Yong (Mok) and Kang Kwee Hee (Kang) entered into an agreement (the Agreement) wherein it was stated that they were the registered proprietors of the land held under Johore Government Grant No. 10509 situated at Batu Pahat (the Land) together with eleven buildings erected thereon known as TCBP Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 in equal undivided shares, that the parties had mutually agreed to divide up the Land and the said buildings between them resulting in Mok being entitled to the portion of the Land and five buildings standing thereon known as Nos. 16, 17, 18, 19 and 20 (the five shophouses) and Kang being entitled to the remaining portion of the Land on which buildings Nos. 21, 22, 23, 24, 25 and 26 (the six shophouses) were standing, that Kang having become entitled to one more shophouse (the extra shophouse) and portion of the Land on which the extra shophouse stood, he Kang agreed to pay a sum of RM4,000 to Mok. The agreement witnessed such payment and in consideration thereof it was agreed that Kang would be entitled thereafter to the profits and liable for the outgoings in respect of the six shophouses and likewise Mok in regard to the five shophouses and that they were respectively entitled to the Land in proportion to that on which these shophouses respectively stood. The parties went on to agree to carry out subdivision of the Land at a future time, the costs thereof to be borne proportionately by them. They also agreed that upon Mok subsequently transferring his rights and interests in the said Grant to his nominee or nominees, the transfer would be in

accordance with the terms embodied in the agreement. The parties described themselves in the agreement as including their heirs, executors administrators and assigns.

As far back as 22 December 1948 Mok and Kang were the registered proprietors of the Land. On 23 July 1966 Tan Yeow Toi (Tan) who was Mok's wife became the registered proprietor by transfer of Mok's half undivided share in the land. On 28 November 1966 the defendant became the registered proprietor by transfer of Tan's half undivided share in the land. On 21 October 1969 the plaintiffs became the registered proprietors by transfer of Kang's half undivided half share of the land.

The six shophouses were registered in the name of the plaintiffs and or their predecessor in title, in the records of Majlis Daerah Batu Pahat. The plaintiffs have paid assessment in respect of the six shophouses. The defendant has paid assessment of the five shophouses.

In 1987 the defendant claiming to be the owner of a half undivided share in the Land wrote to the second plaintiff with a copy each to the first and third plaintiffs asking for reimbursement of a sum of RM2,447.30 being 50% of a sum of RM4,894.60 paid by him as quit rent for the Land for the years 1983 to 1987. After several reminders for reimbursement which met with no response, the defendant commenced action against the plaintiffs in the Magistrates Court Batu Pahat for the same. The plaintiffs through their solicitors Messrs. Yeo Hock Tye & Co. by way of letter dated 22 September 1987 paid the said sum of RM2,447.30. The statement of claim in the action described the defendant as the owner of half undivided share of the land. In March 1988 the defendant claimed reimbursement of a sum of RM400 being 50% of the quit rent for the year 1988 for the said Land. After several reminders including a threat by the defendant to take legal proceedings against them, the plaintiffs by letter dated 17 October 1988 paid the defendant a sum of RM400 as their share of the quit rent.

On or before 13 July 1988 one T.S. Tang on behalf of the plaintiffs requested the defendant to approve a draft layout plan to partition the land on the basis of a $^{6}/_{11}$ undivided share for the plaintiffs and a $^{5}/_{11}$ undivided share for the defendant but the defendant refused to approve or sign the same claiming that he was entitled to a half undivided share of the Land and the partition should reflect this position.

The plaintiffs are claiming a declaration that they are entitled to an undivided $^{6}/_{11}$ share of the Land together with the six houses and that the defendant is entitled to an undivided $^{5}/_{11}$ share of the Land together with the five shop-houses, the pleaded basis of the plaintiff's claim being that the defendant was a trustee or volunteer in respect of the extra shophouse, that the defendant had notice of his entitlement being limited to $^{5}/_{11}$ undivided share, he having been informed of the same by Tan and he indeed having acted consistently with that position since 1966, that by refusing to give effect to the agreement and the representation by Tan, the defendant had committed fraud as he had so done by refusing to subdivide or partition the Land in accordance to the terms of the agreement.

The defendant pleaded that he did not know of the eleven houses when he purchased the Land and that he became aware of them only when one of the plaintiffs sent him a draft sub-division plan for approval. The defendant also claimed to have had no knowledge of the agreement when he purchased the undivided half share of the Land which he did so in good faith and for valuable consideration. The defendant then counterclaimed for a declaration that he on the one hand and the plaintiffs jointly on the other hand were the co-owners each owning a half undivided share in the Land.

Kang and Mok have since passed away, in 1979 and 1988 respectively. The facts hereinbefore recited were agreed between the parties.

The defendant being the registered proprietor of an undivided half share of the Land his title thereto pursuant to the provisions of s. 340(1) of the National Land Code (the Code) is indefeasible. Upon a consideration of all the evidence I am of the view that the plaintiffs have failed to establish that the defendant's title is defeasible. In order to have done so the plaintiffs needed to establish that the defendant was guilty of dishonesty in relation to the transaction resulting in registration because fraud of the kind mentioned in s. 340(2) of the Code is of such a kind. See *Assets Company Limited v. Mere Roihi & Ors.* [1905] AC 176, fraud of that kind, in the first place had to be pleaded. It was not pleaded. Even if it was pleaded it had to be proved as actual fraud, as against constructive fraud, and

that actual fraud had to be proved beyond reasonable doubt. See *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81. As far back as 21 October 1969 as is deducible from the undisputed facts stated above the plaintiffs knew that the defendant was registered as proprietor of an undivided half share of the Land and must be taken to have accepted that as a fact for they did nothing to indicate otherwise, until much later that is to say in 1988 when they tried to alter the situation.

Apart from any question of defeasibility of title or otherwise, the plaintiff's claim, in my view, is time-barred. Section 9(1) of the Limitation Act 1953 is as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

If the plaintiffs had any right at all that right had to be by virtue of the provisions of the agreement, the plaintiffs enjoying the same by right of succession. The right if enjoyed by the plaintiff would have been a right *in personam*, one against Mok and in the event of his death his personal representative, ordinarily his executor or administrator standing as such by right of Grant of Probate or Letters of Administration respectively. The right of action of the plaintiffs would have commenced on the date of the agreement and any action the plaintiffs saw fit to bring in respect of that right had to be brought within twelve years of the date of the agreement. That period had long expired when this action commenced. The plaintiffs' claim being clearly statute-barred the Court has the power to strike out the claim. See *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207. See also *Chung Khiaw Bank Ltd. v. Tio Chee Hing* [1987] 2 MLJ 701.

The plaintiffs by making payment by way of reimbursement in respect of quit rent for the Land as claimed by the defendant in the Magistrate's Court wherein the defendant pleaded that he was the owner of an undivided half share in the Land and furthermore having paid 50% of the quit rent for the year 1988, all as stated aforesaid, must be taken to have admitted and acknowledged that the defendant is without dispute the owner of and entitled to half undivided share of the Land.

Additionally any rights of the plaintiffs under the agreement have merged into the conveyance. That is in common law parlance. Translated into our Torrens System it means that once the purchaser is registered as the proprietor the rights under the agreement are extinguished unless the agreement expressly or impliedly provides for those rights to continue. See *Knight Sugar Company Ltd. v. The Alberta Railway & Irrigation Company* [1938] 1 All ER 266 at pages 269 and 270, applied by the Supreme Court of New South Wales in *Pallos v. Munro* [1970] 92 WN 797 at p. 799 and also in the New Zealand case of *Montgomery and Rennie v. Continental Bags (NZ) Ltd. & Anor.* [1972] NZLR 884 at p. 889 and indeed by the High Court of Australia in *Svanosio v. McNamara* [1956] 96 CLR 186 at pp. 206 and 207. There was no such provision in the agreement.

In any event the plaintiffs by reference to the agreement were not heirs, executors, administrators or assigns of the parties thereto and therefore enjoyed no rights thereunder.

For the reasons abovestated the plaintiffs' claim is dismissed with costs to be taxed. As to the defendant's counterclaim his claim for an account is disallowed, his claim for partition is allowed, in terms of prayer (a) to (f). There is to be no order as to the costs of the consideration.